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NO. 90-582

In The Supreme Court Of The United States

October Term, 1990

BENTON, BENTON & BENTON,
A Professional Law Corporation,

Petitioner,

v.

LOUISIANA PUBLIC FACILITIES AUTHORITY,
STEVE E. HICKS, FOLEY, JUDELL, BECK,
BEWLEY, MARTIN & HICKS, and
MCCOLLISTER, MCCLEARY, FAZIO & HOLLIDAY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the authority of the Louisiana Public Facilities Authority ("LPFA") to select bond counsel for bonds to be issued by the LPFA derives from the State of Louisiana's "clearly articulated" and "affirmatively expressed" policy to displace competition, as those terms are defined by this Court's decision in *Town of Hallie v. City of Eau Claire.*

2. Whether the LPFA, as a state created public trust, qualifies for state action immunity from the federal antitrust laws without a showing of active supervision under the rationale of this Court's decision in *Town of Hallie v. City of Eau Claire.*

3. Whether state action immunity applies to private parties selected by the LPFA as bond counsel where the antitrust causes of action arise out of the LPFA's selection of those private parties as bond counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LOUISIANA PUBLIC FACILITIES AUTHORITY IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the selection of bond counsel[1] by the Louisiana Public Facilities Authority ("LPFA"). Petitioner, Benton, Benton & Benton (the "Benton Firm"), asserts an

[1] Bond counsel plays an important role in the issuance of tax exempt bonds. Bond counsel assists the issuer in the proceedings incidental to the authorization, issuance, sale and delivery of the bonds to underwriters or private investors. Bond counsel also furnishes an opinion as to the legality of the issuance, the security and the tax-exempt status of the bonds. (Record at 9 ¶ 24.) Securing the opinion of independent bond counsel is a crucial step in the process of completing a successful sale of the bonds. Accordingly, the issuer of the bonds has a strong interest in ensuring that bond counsel's opinions are widely accepted by the marketplace.

antitrust conspiracy between the LPFA and the attorneys selected as LPFA bond counsel to exclude all other attorneys from serving as bond counsel on LPFA bond issuances. The only "evidence" of that alleged conspiracy is the fact that the Benton Firm has never been selected as LPFA bond counsel. In a second count, the bond counsel actually selected by the LPFA are accused of monopolizing the market of acting as bond counsel to the LPFA.

The courts below closely examined the creation and structure of the LPFA. Based upon that factual examination and a careful application of this Court's precedents following *Parker v. Brown*, 317 U.S. 341 (1943), the courts below concluded that the LPFA is a state agency empowered by the State of Louisiana to select bond counsel. As a result, the courts below held that the principle of state action immunity barred the Benton Firm's causes of action.

In seeking to overturn the decisions below, the Benton Firm cannot demonstrate any of the traditional grounds justifying a *writ of certiorari* pursuant to Sup. Ct. R. 10. The decisions below are neither novel nor in conflict with the decisions of this Court or any other Court of Appeals. Rather than attempt to meet these standards, Petitioner relies extensively on matters extraneous to the record, a reliance that Petitioner concedes is improper. Petition at 29 n.53. The Benton Firm attempts to turn selective quotations from various newspaper clippings and unsubstantiated statements of "fact" into a justification to overturn the decisions of the courts below.[2] Though ample time was allowed, the record

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[2] Petitioner's attempt to rely upon extra-record newspaper articles to support its request for a *writ of certiorari* is clearly improper. On more than one occasion, this Court has refused to consider newspaper articles that are not part of the record. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 486 n.3 (1986). The remaining newspaper articles cited by Petitioner, although part of the record, were properly disregarded by the lower courts as inadmissible hearsay. *Poretto v. United States*, 196

reflects little, if any, effort by Petitioner to pursue discovery. The record also reflects that the decisions of the courts below were well founded both factually and legally. There is no reason to reconsider Petitioner's claims.

Petitioner's reliance on the pending appeal in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted*, ___ U.S. ___, 110 S. Ct. 3211 (1990), fails to provide any alternative support for granting a *writ of certiorari* in this case. *Omni* involves a very different factual situation in which the Fourth Circuit created a novel exception to the state action doctrine for private conspiracies. Given the inherent differences between the facts in *Omni* and those in this case, the decision in *Omni* has no application here. The LPFA believes, moreover, that the decision in *Omni* is inconsistent with this Court's prior decisions and should be reversed.

I. The Structure of the LPFA.

The LPFA was created in 1974 pursuant to the Louisiana Public Trust Act (the "Act"), La. Rev. Stat. Ann. §§ 9:2341-9:2347 (West 1989 Supp.), to facilitate the issuance of conduit municipal bonds in the State of Louisiana. The District Court found that the LPFA, as a public trust, may act only for

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F.2d 392, 395 (5th Cir. 1952); see Fed. R. Civ. P. 56(e). Thus Appendices N, O, P, Q, R, S, T, U, V, W, X, Y and Z, and the portions of Petitioner's brief that purport to rely on those articles, should be ignored by the Court. There is no admissible evidence of a conspiracy, or indeed any other fact alleged by Petitioner in support of its claims. Petitioner forwent its opportunity to conduct discovery; this Court should not be persuaded to offer Petitioner a renewed opportunity to garner evidence in support of its claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("no serious claim can be made that Respondent was in any sense "railroaded" by a premature motion for summary judgment" when judgment was granted after the case had been pending for two years.)

authorized public functions or purposes of the State of Louisiana. *Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 897 F.2d 198, 200 n. 1 (5th Cir. 1990); § 9:2341(B).[3] In fact, the State of Louisiana is the beneficiary of the trust created by the LPFA.

The Act requires extensive oversight of public trusts such as the LPFA by the executive and legislative branches of the Louisiana government. For example, creation of a public trust requires express approval of the governor and two-thirds of the elected members of each house of the legislature. § 9:2341(A). The Act compels each trust to enact by-laws, over which the governor retains a veto power. § 9:2341(C). The trustees of a public trust are appointed by the governor and are "public officers" within the executive branch of the Louisiana state government. § 9:2343; La. Rev. Stat. Ann. § 36:6 (West 1986).

In addition, the District Court expressly found:

> As we have seen, under § 2341 D, the Authority is a public trust and public corporation of the state. It is authorized to provide funding for "any authorized public function or purpose of the state." Every trustee is subject to the provisions of the law on public payroll fraud and public contract fraud and is required to take the oath of office required of public officials. § 2343 A. Meetings of the trustees are required to be open to the public and records are required to be public records and all contracts for construction, labor, equipment, material

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[3] Throughout its petition, the Benton Firm exhibited a gross disregard for the lower courts' conclusions and the facts established in the record. Beginning with its opening paragraph, the petition divorces itself from reality by stating as "fact" that the LPFA had an "arrangement" with the Respondent law firms and that the LPFA exists "for the benefit of private commercial borrowers." (Petition at 2). The allegation of an agreement in restraint of trade is vigorously denied by Respondents and is inconsistent with the District Court's opinion. The contention that the LPFA exists for the benefit of private borrowers is flatly contradicted by the enabling legislation and the findings of the District Court.

> or repairs must be awarded according to the state's public bid laws. § 2343 D and E. Trustees may be removed from office for malfeasance. § 2343 F(2). All public trusts are subject to the supervision of the legislative auditor of the state to the same extent as the public beneficiaries and such trusts are audited on an annual basis by the legislative auditor. § 2346. All bond issues must be submitted to and approved by the state bond commission and attorneys fees incurred in connection with the issuance of bonds shall be subject to approval of the attorney general. § 2347 H and K.

897 F.2d at 203.[4]

Additional limitations on the authority of a Louisiana public trust, such as the LPFA, are contained in an indenture of trust. The indenture, which defines the mode of operation of the trust, constitutes a binding contract between the state and the trust after it is accepted by the governor and two-thirds of the legislature. § 9:2342(A). Amendments to the indenture of trust require the approval of the executive and legislative branches of the state. § 9:2342(B).

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[4] These conclusions of the District Court, based on the LPFA's enabling legislation, are plainly contradictory to the Benton Firm's suggestion that the governor's power to appoint trustees is "nominal" or that the LPFA is "autonomous" and "insulated" from review. (Petition at 3). The Benton Firm's rhetoric may be intended to suggest that the state has imperfectly exercised its powers of appointment and supervision. That argument, however, even if it had some factual support, has no bearing on the question of whether *Parker* immunity is available. *See New England Motor Rate Bureau, Inc. v. Federal Trade Comm'n,* 908 F.2d 1064, 1071 (1st Cir. 1990) (so long as the statutory system for oversight is in place, the state action doctrine will not become a vehicle "for federal oversight of state officials," merely because the state exercises its powers infrequently.); *cf. Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886, 891 (9th Cir.), *cert. denied,* ___ U.S. ___, 109 S. Ct. 489 (1988).

Article VII of the LPFA's Indenture of Trust sets out the powers of the LPFA's trustees. Record at 216-241. The Indenture expressly permits the LPFA to "*appoint* and compensate attorneys . . . in connection with the issuance of any such bonds, notes, evidences of indebtedness or other obligations of the Authority." Art. 7.1(d)(iii) (emphasis added); Record at 232.[5] The Indenture further grants the Trustees the power to "contract for the furnishing of any services or the performance of any duties that they may deem necessary or proper, and pay for them as they see fit." Art. 7.1(o); Record at 235. Section VII concludes: "The Trustees are hereby empowered and authorized to do all things provided for by Article III hereof [the Statement of Purposes] whether hereinabove specifically enumerated or not." § 7.1(t); Record at 236.

II. The Proceedings Below.

Petitioner brought an antitrust action against the LPFA arising out of its selection of bond counsel. The Benton Firm alleged that the mere facts of the LPFA's employment of the Respondent law firms and the LPFA's failure to hire Petitioner constituted prima facie evidence of an agreement to exclude Petitioner from serving as bond counsel in connection with LPFA bond offerings. The Respondents each denied the existence of any agreement, much less an anticompetitive agreement. Indeed, the LPFA has consistently maintained that it selects its bond counsel on a transaction-by-transaction basis.

During the two years prior to Respondents' motions, only one deposition was sought; the Respondents took the deposition of

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[5] The Indenture grants the LPFA broad authority to employ and retain bond counsel; it also specifically empowers LPFA Trustees to employ attorneys "as may be deemed necessary in the discretion of the Trustees to properly operate the business of the Authority, and [to] fix their duties, terms of employment and compensation." Art. 6.18; Record at 230.

Mr. Fred Benton, the principal of the Benton Firm. The Petitioner made two document requests of the Respondents. The Benton Firm never sought any additional discovery. After the deposition of Mr. Benton, the Respondents filed separate motions for summary judgment seeking dismissal of the lawsuit on two grounds: (1) that the LPFA's choice of an attorney to serve as bond counsel could not form the basis of an antitrust claim; and (2) even if it could, the Respondents' conduct was immune from antitrust challenge because the LPFA's selection of bond counsel constituted state action not subject to the Sherman Act.

In its pleadings, the Benton Firm admitted that bond counsel, in the sense of the counsel selected by the LPFA, must be independent of the interested parties to the transaction, and that bond counsel's clients are the purchasing public. Original Brief of Appellant at 4-5. On deposition, Mr. Benton acknowledged that the choice of bond counsel rests with the LPFA and not with project sponsors. He admitted that project sponsors should not have the right to select bond counsel because "the issuing authority has that right."[6] Record at 376. Mr. Benton acknowledged that the LPFA has an interest in who serves as bond counsel and that the LPFA "certainly" has the right to avoid choosing incompetent bond counsel. Record at 373, 375. He admitted, moreover, that it is important for bond counsel to have a good working relationship with the issuing authority and that every LPFA trustee has a duty to base the selection of bond counsel on performance. Record at 375.[7]

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[6] Project sponsors have an inherent bias to see that the bonds are issued at all costs; without the funds from the sale of bonds, the project cannot proceed. Hence, bond counsel that owed allegiance to project sponsors would face serious conflicts of interest.

[7] Petitioner boldly, but erroneously, asserts in its petition that the "LPFA has refused to allow petitioner . . . to serve as bond counsel" and that the Respondent lawyers have "induced the LPFA . . . to coerce project sponsors . . . to discharge petitioner." Petition at 5. No record

The litany of "examples of non-competitive conduct" provided in the Petition at 6-8 are an accumulation of primarily post-record allegations that depend solely upon inadmissible hearsay. The antitrust significance of that conduct is unclear from Petitioner's argument. Indeed, the only item in the list with potential antitrust overtones, the alleged charging of higher than competitive fees for bond counsel, is a non-issue because the Attorney General must review and approve LPFA bond counsel fees. § 9:2347(K).

III. The Decisions Below.

On November 8, 1988, the District Court granted the Respondents' motions for summary judgment and dismissed the lawsuit. In addition to the specific findings referenced above, the District Court specifically found:

> Here the selection of counsel is clearly made by the Authority, the public agency. The private parties, the lawyers, are simply selected to perform legal services for and on behalf of the public agency. The state legislature clearly authorized the Authority to employ bond counsel in connection with the issuance of bonds and placed no restrictions upon the Authority in that connection, except that the attorney general must approve the fee.

897 F.2d at 204. Furthermore the Court concluded as a matter of law that "the Authority is a state agency and, as such, active state supervision of its activities is not required." 897 F.2d at 203.[8]

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cites are offered, however, for these accusations, because none exist. Rather, the record reflects that all the LPFA has *ever* done is to select unilaterally its bond counsel. Project sponsors remain free to engage their own counsel, at their own expense, to perform any services the project sponsor requests.

[8] Contrary to the statement in the Petition at Footnote 2, the District Court did not hold that the existence of special LPFA counsel, in addition to bond counsel, foreclosed the LPFA's comparison of this case to those in which the inclusion of lender attorney's fees in the cost

On March 30, 1990, the Court of Appeals for the Fifth Circuit unanimously affirmed the decision of the District Court, stating simply:

> After careful review of the record, we find that the district court properly and thoroughly analyzed this issue. Hence, we find no error in the district Court's reasoning that the LPFA, at least for these purposes, is a state agency and enjoys immunity as a public agency from the allegations Benton charges.

897 F.2d at 199. Petitioner's requests for rehearing and rehearing *en banc* were denied on May 17, 1990.

REASONS FOR DENYING THE WRIT

I. The Enabling Legislation Governing the LPFA Meets the Standard Set In *Town of Hallie*, for a Finding of a "Clearly Articulated and Affirmatively Expressed" Policy to Displace Competition.

The Benton Firm invites this Court to grant *certiorari* to revisit the "clear articulation" element of state action immunity. Petitioner argues that this Court has not sufficiently defined the degree of "legislative specificity" necessary to prove a clear articulation of Louisiana's intent to displace competition. Petition at 22. According to Petitioner, the clear articulation standard should require the Louisiana Legislature solemnly to proclaim, "The LPFA may repeatedly choose the same law firm to serve as official bond counsel for each financing in which it participates." Petitioner is wrong.

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of financing did not state an antitrust cause of action. Indeed, the District Court distinguished those cases only because the LPFA is a borrower instead of a lender. The LPFA objected to this distinction on appeal to the United States Court of Appeals for the Fifth Circuit. Because of its decision to affirm the District Court's state action analysis, the Fifth Circuit did not address this issue.

The clear articulation standard has been fully and carefully explained by the decisions of this Court. Neither additional assistance from this Court nor the excruciating specificity suggested by Petitioner is required in order to satisfy the clear articulation requirement. The District Court correctly relied on this Court's decision in *Town of Hallie* when it held that "the state legislature clearly authorized the Authority to employ bond counsel in connection with the issuance of bonds and placed no restrictions upon the Authority in that connection, except that the attorney general must approve the fee." 897 F.2d at 204.

Petitioner misleads the Court by suggesting that there can be no satisfaction of the clear articulation standard because the Act "does not mention bond counsel or the manner of selection of bond counsel." Petition at 24. The Benton Firm ignores the importance of the Indenture as further indication of the state's policy. The Act requires that the LPFA's authority be set forth in an indenture of trust. § 9:2342. The LPFA's Indenture, approved by the state, makes special provision for the employment of bond counsel. Article 7.1(d)(iii). Thus, the state's policy regarding the employment of bond counsel could not be more explicit. *See First Am. Title Co. of South Dakota v. South Dakota Land Title Ass'n,* 714 F.2d 1439, 1454 (8th Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984) (including agency rules and regulations within materials considered for finding the state's clearly articulated policy). The District Court's conclusion that Louisiana had clearly articulated its policy regarding the selection of counsel is both legally and factually supported.

In *Town of Hallie,* the Court squarely faced the issue of "how clearly a state policy must be articulated" for the purposes of *Parker* immunity. In that case, this Court held:

> As discussed above, the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have

> stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.
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> ***
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> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.
>
> ***
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> Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences . . . In fact, this Court has never required the degree of specificity that the Towns insist is necessary.[7]
>
> [7] Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statues. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

Town of Hallie, 471 U.S. at 42-44. The LPFA need not show that the state compelled it to select particular bond counsel, or employ bond counsel in a particular way; nor must the LPFA show that the Louisiana Legislature expressly stated that it intended the LPFA to use its broad authority to hire bond counsel in an anticompetitive manner. *Town of Hallie,* 471 U.S. at 39-40.

In *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48 (1985), this Court reinforced its opinion in *Town of Hallie,* by rejecting the notion that a state must compel parties to engage in the challenged conduct. 471 U.S. at 62; *see also, Town of Hallie,* 471 U.S. at 46. This Court held that a state, to articulate sufficiently its policy, need only authorize the partic-

ular conduct, and by that authorization clearly intend to displace competition:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

471 U.S. at 61.

The circuit courts of appeal have followed the lead set by this Court in *Town of Hallie* and *Southern Motor Carriers* to hold that a state's grant of the power to enter a contract or franchise is dispositive proof of a clearly articulated policy to displace competition. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985), for example, the power to enter contracts was sufficient to demonstrate the Texas Legislature's clearly articulated policy to displace competition. [9]

Other appellate decisions demonstrate the degree of specificity necessary to find a clear articulation of a policy to displace

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[9] *See also, Consolidated Tele. Cable Serv., Inc. v. City of Frankfort, Kentucky*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, ___ U.S. ___ 109 S. Ct. 1537 (1989) (power to franchise); *Cine 42nd St. Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032 (2d Cir. 1986) (power to lease); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9 (1st Cir. 1987) (power to contract); *Gold Cross Ambulance and Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985) (power to contract); *Springs Ambulance Serv. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (power

competition. For example, a municipality with a right of first refusal to consent to competing construction acted pursuant to a clearly articulated policy to displace competition when it refused to consent to the construction of a competing water system. *Auton v. Dade City, Florida,* 1986-1 Trade Cas. ¶ 66,973 (11th Cir. 1986). A power to zone has been held to be a clearly articulated policy to displace competition. *Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886 (9th Cir.), *cert. denied,* ____ U.S. ____, 109 S. Ct. 489 (1988). Indeed, a state bar with the authority to compel attorneys to obtain malpractice insurance and to fund the bar's malpractice pool, acts pursuant to a clearly articulated policy to displace competition when it compels all licensed attorneys to obtain primary malpractice coverage from the state bar. *Hass v. Oregon State Bar,* 883 F.2d 1453 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S. Ct. 812 (1990).

There is no confusion among the lower courts requiring this Court to exercise its jurisdiction and expend its finite attention and resources to reconsider the parameters of the "clear articulation" standard. Indeed the circuit courts, consistent with the Fifth Circuit in this case, have had no trouble applying this Court's *Town of Hallie* opinion to evaluate the "clear articulation" standard. There is plainly no reason for this Court to grant the Benton Firm's petition for *certiorari* on this point.

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to contract). In addition, an appellate court has found clear articulation of state policy on behalf of a municipality with authority to regulate sanitation services but no express power to franchise. *L & H Sanitation, Inc. v. Lake City Sanitation,* 769 F.2d 517 (8th Cir. 1985).

II. The District Court Correctly Determined That the LPFA Need Not Show Active Supervision to Qualify for State Action Immunity.

The District Court found that the LPFA possessed the characteristics of a state agency and, thus, that active supervision of the LPFA's activities was not required to support a finding of *Parker* immunity under the *Midcal* standard.[10] Contrary to the Benton Firm's contentions, that finding is specifically supported by this Court's *Town of Hallie* decision.

In *Town of Hallie,* the Supreme Court acknowledged that the active supervision prong of the *Midcal* test did not comport with the responsibilities and powers of local governments to supply services for local populations. The Court held that the active supervision requirement:

> serves essentially an *evidentiary function:* it is *one way* of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. . . . Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Town of Hallie, 471 U.S. at 46-47 (emphasis supplied). This Court did not expressly limit the application of *Town of Hallie's*

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[10] The LPFA notes, however, that the record is replete with evidence of the degree of active supervision exercised by the State of Louisiana over the LPFA's activities, including the selection of bond counsel. Indeed, Petitioner concedes that the LPFA is actively supervised by the Louisiana legislature by asserting that a "proposed refunding was rejected by the State as serving no purpose other than the generation of bond counsel and other fees." Petition at 8.

rule to traditional municipalities. Instead, it acknowledged that there may be alternate, yet equally persuasive, evidence of compliance with a state's articulated policy sufficient to render the active supervision inquiry unnecessary for other types of non-private entities.

The Fifth Circuit in this case was not the first appellate court to apply the Court's *Town of Hallie* opinion outside of the pure municipality context. For example, the court in *Interface Group, Inc. v. Massachusetts Port Authority,* 816 F.2d 9, 13 (1st Cir. 1987), held, "Even if Massport is not the 'state' itself, it at least is *equivalent to* a municipality." (emphasis supplied.) The Eleventh Circuit had already come to the same conclusion with respect to an airport authority. *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.,* 801 F.2d 1286, 1290 (11th Cir. 1986) ("Active state supervision is not a prerequisite to state action immunity for The Authority whether or not it is characterized as a "municipality." . . . The Authority is analogous to a municipality.").[11]

Most recently, the Seventh Circuit applied many of the decisions relied upon by the LPFA to find that the Rural Electric Convenience Cooperative ("RECC"), a private, non-profit energy cooperative need not be actively supervised to support its claim of state action immunity. In *Fuchs v. Rural Electric*

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[11] *See also Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv., Inc.,* 819 F.2d 910 (9th Cir. 1987), (a charitable corporation organized by one county and two cities was entitled to be treated as a municipality under the *Town of Hallie* standard); *Consolidated Tele. Cable Serv. v. City of Frankfort, Kentucky,* 857 F.2d 354 (6th Cir. 1988), *cert. denied,* ____ U.S. ____, 109 S. Ct. 1537 (1989) (cable franchisee was a "municipal agent" and therefore the court need not reach the supervision prong of *Midcal*); *Cine 42nd St. Theater Corp. v. Nederlander Org.,* 790 F.2d 1032, 1047 (2d Cir. 1986) ("The UDC, like a municipality, is by statute a political subdivision of the state. Therefore its interests must be defined as public rather than private, and consequently the active supervision requirement is unnecessary.")

Convenience Cooperative, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1744 (1989), the Seventh Circuit held:

> . . . when an entity charged with an antitrust violation is neither a municipality nor a state agency but does not have the attributes of a purely private actor, it may be held immune as a state actor without the active scrutiny of market conditions which is a necessary prerequisite for holding a private entity immune.

858 F.2d at 1217-18.

Petitioner relies on only one case, *Riverview Investments Inc., v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 151 (1990), to support its argument that *certiorari* should be granted as to the issue of whether the LPFA must show active supervision by the state. *Riverview Investments*, however, is not the mirror image either of this case or the cases on which the LPFA relies. In *Riverview Investments*, the bond issuing defendant, the CIC, was privately created. Its members were privately selected. The village had no say over the structure and operation of the CIC. The CIC had the exclusive right to amend its regulations without village approval. The village had no right to appoint members to the CIC, nor did it have any control over the CIC. The Sixth Circuit expressly noted these facts, which, in the court's opinion, distinguished *Riverview Investments* from *Consolidated Television*, *Ambulance Service of Reno*, and *Cine 42nd Street*. 899 F.2d at 479-481. See note 11, *supra*.

The LPFA, by contrast to the CIC, is a subordinate governmental unit of the State of Louisiana, empowered to act only for defined public purposes. 897 F.2d at 203; § 9:2341(B). The LPFA is run by public officials, who are appointed by the governor, subject to the oath of office, and removable for cause. § 9:2343. The LPFA is subject to the laws promulgated, and the Indenture of Trust accepted, by the State of Louisiana. §§ 9:2341

et seq. The LPFA is audited annually by the Louisiana State Auditor. § 9:2346. The LPFA's bonds must be approved by the state. § 9:2347. Hence, the LPFA cannot be compared to a purely private entity such as the CIC in *Riverview Investments.*

The evidentiary function imposed by the active supervision requirement is not necessary here, just as it was not in *Town of Hallie* and the other cases cited above, because the framework under which the LPFA was created and is administered provides ample security that private actors are not manipulating the laws for unlawful gain. The Fifth Circuit's decision in this case is consistent with this Court's precedent and the opinions of other appellate courts. There is no cause for this Court to grant *certiorari* to review the Fifth Circuit's affirmation of the District Court's conclusions.

III. A Conspiracy Exception to *Parker* Immunity is Fundamentally Inconsistent With the Rationale For the State Action Doctrine.

The pending appeal in *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127 (4th Cir. 1989), *cert. granted,* ___ U.S. ___, 110 S. Ct. 3211 (1990), has been brandished by Petitioner as a coattail to ride to review by this Court. In its *Omni* decision, however, the Fourth Circuit departed from established precedent and the underlying rationale of *Parker* immunity to create a "private conspiracy" exception. Thus, that decision is appropriately before this Court. Nevertheless, that appeal provides no independent reason for delaying the finality of Petitioner's case, much less a grant of *certiorari.* Petitioner's suggestion of a conflict among circuits that impacts the outcome of this case is but a mirage. Moreover, even were the *Omni* case comparable to this case,[12] there is no basis in this

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[12] The LPFA is puzzled by Petitioner's suggestion that this case is the "converse" of *Omni.* Petition at 14. The elements of "illegal bribery" or the state's operation in the allegedly affected market are not present

Court's precedent for creating a conspiracy exception to *Parker* immunity that would, in effect entirely eviscerate the state action doctrine.

Omni, and the principal cases on which the Fourth Circuit relied,[13] involved alleged private conspiracies regarding the enactment and enforcement of zoning ordinances. The distinction between those cases and this one is obvious. A zoning ordinance operates to alter free competition by precluding types of commercial activities in certain districts. The authority of a municipality to zone within its territorial jurisdiction does not, however, in any way contemplate or require that the municipality enter an agreement with a private party to enforce or enact a particular ordinance. In other words, the municipality is charged to consider all of its interested constituents and conduct its zoning plans with civic goals in mind.

Zoning ordinances are distinguishable from those aspects of government designed to provide services to populations. Transportation, sanitation, communications and public financing are just some of the commercial enterprises delegated to and regulated by agents of state or local government. The state actors in charge of these enterprises cannot always provide all elements and services incidental to their charge. Thus, state legislatures permit these state actors to award franchises and to contract for services. A state policy, such as in this case, which permits the state actor to enter contracts to obtain necessary services cannot be accomplished at all without an agreement with the service provider.

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here, just as they were not in *Omni*. The nine extra-record, allegations of impropriety identified in the Petition at 6-8 do not state examples of independently illegal activity.

[13] *Westborough Mall, Inc. v. City of Cape Girardeau, Missouri*, 693 F.2d 733 (8th Cir. 1982), *cert. denied, 461 U.S. 945 (1983); Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Often, as in this case, such a contract necessarily excludes all others who may be willing or able to provide the same service to the state actor. A conspiracy exception applied to the LPFA's employment of bond counsel would essentially prevent the LPFA from obtaining bond counsel for LPFA bonds because the act of engaging counsel, itself, might trigger liability under Section 1 of the Sherman Act. Surely, this is not an appropriate result.

Although decided on the theory of a conspiracy exception, the *Omni* case is more appropriately considered as a case in which the Court was not persuaded of the state's clearly articulated policy to displace competition.[14] Indeed, the LPFA's analysis of *Omni* is supported by *Scott v. City of Sioux City, Iowa,* 736 F.2d 1207 (8th Cir. 1984), *cert. denied,* 471 U.S. 1003 (1985). In *Scott,* the Eighth Circuit revisited its *Westborough Mall* opinion, (on which the Fourth Circuit relied in *Omni*), stating:

> In that case, however, we did not have specific legislative authorization of the acts complained of and requisite legislative intent. We do not think Sioux City should be deprived of immunity simply because Weiner knew some of the council members and perhaps talked to them personally about factors important to the success of the downtown project. The purpose of state action immunity is to allow states and municipalities with state authorization to pursue health and welfare goals without threat of antitrust liability. That purpose would be frustrated in this case if the mere label "conspiracy" were enough to warrant an antitrust trial.

736 F.2d at 1215.

Similarly, the Tenth Circuit rejected a plaintiff's allegation of a "private conspiracy" regarding an urban renewal project in *Oberndorf v. City and County of Denver,* 900 F.2d 1434, 1439

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[14] In this respect, the *Omni* decision is in conflict with the Ninth Circuit's decision in *Boone,* in which the Court stated, "The power to zone and rezone, for example, by its very nature encompasses the power to exclude competition." 841 F.2d at 890.

(10th Cir.), *cert. denied,* ____ U.S. ____, 111 S. Ct. 129 (1990). The court observed that the allegations evidencing the private conspiracy were "not supported by sufficient evidence" and that the plaintiffs did not "show how these instances of misrepresentation relate to their claims that the urban renewal plan was not authorized by state law." The same observations may be made with respect to Petitioner's litany of alleged wrongdoing, none of which is supported by admissible evidence of record, and none of which goes to the issue of whether the LPFA is authorized to select bond counsel.

Petitioner also looks to *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), in support of its private conspiracy exception to *Parker* immunity. In that decision, however, the Court refused to find *Parker* immunity because the minimum fee schedules promulgated by the state bar were merely suggestive, and not compelled by the state. 421 U.S. at 789-791. Of course, in *Southern Motor Carriers,* the Court reconsidered and rejected the compulsion requirement. 471 U.S. at 61. More importantly, the Court found in *Goldfarb* that "far from exercising state power to authorize binding price fixing, [the state] explicitly directed lawyers not "to be controlled" by fee schedules. 421 U.S. at 789. The opinion in *Goldfarb* does not advance Petitioner's private conspiracy theory because, again, there was no clear articulation of a state policy to displace competition.

Petitioner's remaining support for a conspiracy exception to *Parker* immunity is equally unavailing. The decision in *Bolt v. Halifax Hospital Medical Center,* 891 F.2d 810 (11th Cir.), *cert. denied,* ____ U.S. ____, 110 S. Ct. 1960 (1990), raises the issue of whether *ultra vires* acts may be immunized as state action.[15] As in the case of *Westborough Mall,* the issue of *ultra vires* conduct is the flip-side of the clear articulation inquiry. Recently, a district court remarked, "the issue of whether the City has acted *ultra*

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[15] There is no allegation in the record that the Trustees of the LPFA have engaged in *ultra vires* activities.

vires will be decided by the same process as the determination of whether immunity should attach, the existence of proper state authorization. Plaintiff's argument is therefore tautological." *Paragould Cablevision, Inc. v. City of Paragould, Arkansas,* 739 F. Supp. 1314, 1319-20 (E.D. Ark. 1990). There is no logic to a private conspiracy exception to state action immunity for allegedly "*ultra vires*" conduct, because any such conduct would not meet the clear articulation standard.

The Petitioner also relies on *Bolt* because, in a footnote, that decision suggests that only unilateral action of the state may be exempt from the antitrust laws. The footnote from *Bolt* cited by Petitioner here, takes this Court's language in *Parker* grossly out of context. As this Court stated in *Parker:*

> But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state. . .
>
> . . . and we have no question of the state or its municipality becoming a participant in a private agreement . . .

317 U.S. 350-351. To lift this language in *Parker* out of context, and without consideration of this Court's subsequent clarification of the standards for state action immunity, is to disregard the meaning and purposes of the immunity in favor of mere verbal tricks. Indeed, this language in *Parker* presages the Court's articulation of the standard for state action immunity in *California Retail Liquor Dealers Ass'n v. Midcal,* 445 U.S. 97 (1980), as later refined for public actors in *Town of Hallie.* The essential inquiry is the state's expression of a policy that may displace competition.

This Court has recognized that "the reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act." *Hoover v. Ronwin,* 466 U.S. 558, 574 (1984). Here, the state granted the LPFA the power to select bond counsel. That expression necessarily implied that the LPFA

would be able to select from available counsel. This Court has never required a state to do more, has never questioned a state's motivation, before concluding that its policies are not subject to the antitrust laws.

In *Hoover,* the Court expressly recognized that the motivations of the state in enacting or enforcing its policies are irrelevant when assessing state action immunity.[16] 466 U.S. at 579-80. The Court continued,

> The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on *perceived conspiracies* to restrain trade among the committees, commissions, or *others* who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine.

466 U.S. at 580 (emphasis added.)

The Court's rationale in *Hoover* applies with equal force to the case here of a state agency acting pursuant to the state's clearly articulated policy. In order to conclude otherwise, Petitioner disregards this Court's decision in *Community Communications Co. v. City of Boulder, Colorado,* 456 U.S. 1001 (1981), which is contrary to any limitation of the state action doctrine to unilateral acts of the state. The Court did not reject state action immunity for the City of Boulder because it would not be permissible to award exclusive franchises anticompetitively. Rather, the Court rejected the city's claim of immunity because the state had not clearly articulated a policy to displace competition regarding cable services at the local level. In this case, the state has authorized the LPFA to employ counsel pursuant to a clearly articulated policy to displace competition. That must be the end of the inquiry.

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[16] In *Boone,* 841 F.2d at 891, the court rejected a private conspiracy exception to state action immunity, recognizing that the "ordinary abuses" and "imperfect exercise" of state power are best left to the state tribunals. *See also, Town of Hallie,* 471 U.S. at 44.

In light of the precedents of this Court, the Fourth Circuit departed from established law when it held that a municipality can be liable for an antitrust violation, despite the fact "that *Town of Hallie*'s requirements are satisfied." *Omni*, 891 F.2d at 1132. To proceed with further antitrust analysis after that conclusion is to examine the motivations of state actors and the appropriateness of state policy. This Court has repeatedly rejected that step.[17] For this Court to grant *certiorari* in this case on the issue of a conspiracy exception to state action immunity would invite the reexamination of every action by a municipality or state agency, regardless of whether authorized by the state legislature, to confirm the purity of the actor's motivations. In *Parker*, and again in *Hoover*, and yet again in *Town of Hallie*, this Court has declined to permit federal courts to review the motivations of state actors and the wisdom of state policies that replace competition with regulation. This Court should decline again to entertain this type of review.[18]

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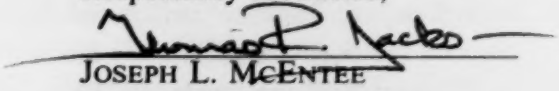
[17] If the only allegation is that the act is anticompetitive, and the *Town of Hallie* standard has been satisfied, this Court's precedent dictates only that there is not an antitrust violation. In an appropriate case, however, a party with a grievance involving both public and private actors has redress through both the state political process and the relevant state laws, if for example, bribery or other wrongdoing has taken place.

[18] The suggestion that the District Court failed to address the Benton firm's § 2 claim is incorrect. The District Court's opinion recognized and encompassed both Petitioner's § 1 and § 2 causes of action under the Sherman Act. 897 F.2d at 202. After it had analyzed the nature of Petitioner's causes of action and the applicability of the state action doctrine, the District Court concluded, "under these circumstances, it is not necessary to pass upon the other issues in this case." 897 F.2d at 204. Pursuant to Louisiana's clearly articulated policy to displace competition, the LPFA's selection of bond counsel is an immune activity. The market that the law firm Respondents are alleged to have attempted to control, the market for service as LPFA's bond counsel, cannot exist absent the LPFA's exercise of its immune power to

CONCLUSION

Petitioner has failed to demonstrate any basis for this Court to grant a *writ of certiorari*. The courts below properly analyzed the facts and applied this Court's prior decisions to conclude that the state action doctrine bars Petitioner's antitrust causes of action. Petitioner, despite resorting to improper extra-record citations, can articulate no basis to review further those decisions. The request for a writ should be denied.

Respectfully submitted,



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select counsel. In these circumstances, the monopolization count depends upon the conspiracy count; there cannot be one without the other. If the LPFA's selection of counsel is immune, the selected counsel, who could monopolize the market for LPFA bond counsel only by their selection, must also be within the ambit of state action immunity. The Court's finding of state action immunity bars both the § 1 and § 2 claims.

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 1990, three true and correct copies of the foregoing Brief of Respondent Louisiana Public Facilities Authority were served by United States mail, postage prepaid, to:

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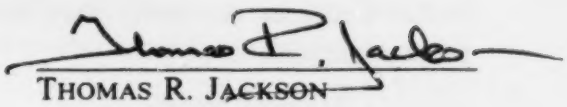

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